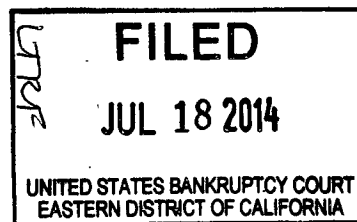


NOT FOR PUBLICATION



UNITED STATES BANKRUPTCY COURT  
EASTERN DISTRICT OF CALIFORNIA

In re

Case No. 12-10802-A-7

Terence Edward Moore,

Debtor.

Timothy E. Moore, individually  
and as trustee of the Edward C. Moore  
and Marie Moore Family Trust dated  
November 12, 1992,

Adv. No. 12-01135-A

Plaintiff,

vs.

Terence Edward Moore,

Defendant.

MEMORANDUM DECISION

1 This is a dispute between brothers over distributions from their  
2 father's trust. Acting as trustee, Terence E. Moore distributed a  
3 firearm collection to himself but failed to collect an equalizing  
4 payment, as required by the terms of the trust, and appropriated trust  
5 stock for his own purposes. Successor trustee Timothy E. Moore  
6 proceeds under 11 U.S.C. § 523(a)(4) to recover the value of the  
7 assets taken plus prejudgment interest and have that debt be excepted  
8 from discharge.

#### 9 **FACTS**

10 Timothy E. Moore ("Timothy"), Terence E. Moore ("Terence"), and  
11 Deborah Moore Houston ("Deborah") are the adult children of Edward  
12 C. Moore ("Edward"). Plaintiff Timothy is the successor, and current,  
13 trustee of his father's inter vivos trust; defendant Terence is the  
14 former trustee. The brothers are estranged. All three children are  
15 the beneficiaries of "The Edward C. Moore and Marie Moore Family  
16 Trust." Marie Moore ("Marie") was Edward's spouse and the siblings'  
17 stepmother. This dispute arose from Terence's actions as trustee.

18 In 1991, Edward and Marie established an inter vivos trust known  
19 as "The Edward C. Moore and Marie Moore Family Trust." The original  
20 declaration of trust named trustees in the following order of  
21 succession: (1) Edward and/or Marie; (2) the survivor of Edward and  
22 Marie; and (3) co-trustees comprised of one of Edward's children and  
23 one of Marie's children. The initial tertiary trustees were Terence  
24 and Jonna M. Key, Marie's daughter; the successor trustees were  
25 Timothy and Vern E. Elston, Marie's son.

26 As relevant here, the trust had a two-pronged distribution  
27 scheme. At Edward's death, all of Edward's firearms were to go to  
28 Terence, who was to make a one-third equalizing payment to Timothy and

1 Deborah each:

2  
3 At the time of Edward C. Moore's death, his gun collection  
4 is to be distributed to his son, Terrence E. Moore.<sup>1</sup> Upon  
5 distribution of the gun collection, Terrence E. Moore shall  
6 pay to both Deborah R. Moore and Timothy E. Moore a cash  
7 settlement equal to one-third (1/3) fair market value of  
8 the gun collection.

9 After both settlors passed, the residue of the trust was to be  
10 divided evenly between Edward and Marie's combined six children:

11 The Trustee shall apply and distribute equally the net  
12 income and principal of each of the shares of the resulting  
13 Trust Estate . . . set aside for the benefit of the  
14 Settlor's named beneficiaries as follows: 1) Terrence  
15 E. Moore, settlor Edward C. Moore's son[;] 2) Deborah  
16 R. Moore, settlor Edward C. Moore's daughter[;] 3) Timothy  
17 E. Moore, settlor Edward C. Moore's son[;] 4) Jonna M. Key,  
18 settlor Marie Moore's daughter[;] 5) Richard A. Elston,  
19 settlor Marie Moore's son[; and] 6) Vern E. Elston, settlor  
20 Marie Moore's son[.]

21 The trust also included an in terrorem clause, which, if  
22 triggered, forfeited a contesting beneficiary's interest and  
23 terminated the contesting beneficiary's status as trustee:

24 [I]f any beneficiary hereunder asserts any claim (except a  
25 legally enforceable debt), statutory election, or other  
26 right or interest against or in Settlor's estate, Settlor's  
27 Will, or any properties of this trust, other than pursuant  
28 to the express terms hereof or of said Will, or directly or  
indirectly contests, disputes, or calls into question,  
before any court, the validity of this instrument or of said  
Will or the validity of any provisions of this instrument or  
of said Will, then, a) Such beneficiary shall thereby  
absolutely forfeit any and all beneficial interests of  
whatsoever kind and nature which such beneficiary might  
otherwise have under this instrument and the interests of  
the other beneficiaries hereunder shall thereupon be  
appropriately and proportionately increased and/or  
advanced, . . . and c) Such claiming, electing, or  
contesting beneficiary, if then acting as a Trustee  
hereunder, shall automatically cease to be a Trustee and  
shall thereafter be ineligible either to select, remove, or

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29 <sup>1</sup> In the pleadings and other documents filed in this bankruptcy,  
30 the name "Terence" has been used. However, in the trust, the name  
31 "Terrence" was used.

1       become a Trustee hereunder.

2       Under the trust, amendments and revocation were authorized during  
3 the joint lives of Edward and Marie but not after either of them died.

4       Marie died in 1996, and, notwithstanding the provision precluding  
5 amendment after her death, in 1997, Edward executed an amendment to  
6 the trust. The amendment purported to make two changes. First,  
7 Marie's children were removed as co-trustees, and Terence was named as  
8 the sole successor trustee upon Edward's death, with Timothy and  
9 Deborah serving as successor trustees if Terence was unwilling or  
10 unable to serve as trustee. Second, it altered the distribution  
11 scheme. Like the original trust instrument, the amended trust  
12 distributed Edward's firearms to Terence with a one-third equalizing  
13 payment to Timothy and Deborah:

14       The Trustee shall apply and distribute the net income and  
15 principal of each of the shares of the resulting Trust  
16 Estate set aside for the benefit of the Trustor's named  
17 beneficiaries as follows: The Trustee shall distribute  
18 Trustor Edward C. Moore's gun collection to Terrence E.  
Moore, Trustor Edward C. Moore's son. Terrence E. Moore  
shall repay one third of the fair market value of the gun  
collection to Deborah R. Moore and one third of the fair  
market value of the gun collection to Timothy E. Moore.

19 But the amendment removed Marie's children from the residuary clause  
20 and distributed the corpus of the trust to Terence, Timothy, and  
21 Deborah:

22       The Trustee shall distribute the Rest and Residue of the  
23 Trust Estate, consisting of the separate property of Edward  
24 C. Moore including, but not limited to the family residence  
located at 482 E. Cleveland Avenue, Porterville, CA, APN  
#253-121-35 and all of Trustor Edward C. Moore's investments  
25 to the following named beneficiaries: Terrence E. Moore,  
26 Trustor Edward C. Moore's son[;] Timothy E. Moore, Trustor  
Edward C. Moore's son[; and] Deborah R. Moore, Trustor  
Edward C. Moore's son.

27       It is Trustor Edward C. Moore['s] specific intent that his  
28 step-children, namely: Jonna M. Key, Richard A. Elston and

1 Vern E. Elston receive nothing at all from the Trust Estate,  
2 since the Trust Estate is all of the separate property of  
Edward C. Moore.

3 Edward died in 2006. At his death, his assets included a bank  
4 account, a residence, 49 firearms, and 400 shares of Sturm Ruger  
5 stock. Immediately upon his father's death, Terence assumed the  
6 position of trustee.

7 Within days of his father's death, Terence distributed the  
8 firearm collection to himself. He never made an equalizing payment to  
9 the trust or to Deborah or Timothy directly.

10 In August 2009, Terence moved the 400 shares of Sturm Ruger stock  
11 to his personal brokerage account, sold those shares netting  
12 \$4,815.31, and deposited those funds into his personal account.

13 Between 2006 and 2011, on at least eight occasions, Timothy  
14 inquired of Terence as to the status of the trust. Terence angrily  
15 rebuffed his brother's informal requests for information. He did not  
16 prepare accountings in the years 2006 through 2010.

17 In 2011, Timothy commenced proceedings in the Fresno County  
18 Superior Court to remove Terence as trustee. Under pressure from his  
19 brother, Terence did file an accounting for the trust covering the  
20 period from September 16, 2006, through October 31, 2011. It failed  
21 to mention either the Sturm Ruger stock or the proceeds. The  
22 accounting did show cash distributions to Deborah and Timothy of  
23 \$150,000 each and to Terence of \$183,157.75. Notwithstanding the  
24 accounting, the Fresno County Superior Court removed Terence as  
25 trustee and replaced him with Timothy.

26 In 2012, Terence filed a Chapter 7 bankruptcy. Timothy,

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28 ///

1 individually and as trustee of the trust,<sup>2</sup> filed an adversary  
2 proceeding under 11 U.S.C. § 523(a)(4), proceeding under a defalcation  
3 theory, to recover the value of the equalizing payment for the firearm  
4 collection and of the 400 shares of Sturm Ruger stock as  
5 nondischargeable debts. The matter was tried in December 2013. In  
6 early February 2014, each side filed closing briefs, which raised new  
7 issues. Timothy sought to amend his pleadings to conform to proof to  
8 additionally recover Terence's disproportionate distributions to  
9 himself of \$33,157.75 under the residuary clause and to include  
10 prejudgment interest on the damages for Terence's breaches of  
11 fiduciary duty. Terence raised the statute of limitations; Timothy's  
12 standing, contending that he had triggered the in terrorem clause  
13 resulting in his "automatic" removal as trustee; and exemptions. The  
14 court invited reply briefs, which were submitted by each side. Final  
15 arguments were made in April 2014.

#### 16 JURISDICTION

17 This court has jurisdiction. See 28 U.S.C. §§ 1334, 157(a); 11  
18 U.S.C. § 523; General Order No. 182 of the U.S. District Court for the  
19 Eastern District of California. This is a core proceeding in which  
20 this court may enter final judgment. See 28 U.S.C. § 157(b)(2)(I);  
21 *Deitz v. Ford (In re Deitz)*, 469 B.R. 11, 17-24 (B.A.P. 9th Cir. 2012)  
22 (holding that dischargeability actions are constitutionally core  
23 matters, notwithstanding *Stern v. Marshall*, 131 S. Ct. 2594 (2011)).

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26  
27 <sup>2</sup> Both a trustee and a beneficiary may assert a claim for damages  
28 on behalf of the trust against a former trustee for breaching the  
trust. See Cal. Prob. Code § 16420(a)(3).

## DISCUSSION

## I. Procedural Matters

## A. Amendments to Conform to Proof

In certain instances, a party may amend the pleadings to conform to proof. See Fed. R. Civ. P. 15(b), incorporated by Fed. R. Bankr. P. 7015.

When an issue not raised by the pleadings is tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings. A party may move--at any time, even after judgment--to amend the pleadings to conform them to the evidence and to raise an unpleaded issue.

Fed. R. Civ. P. 15(b)(2). Amendment is proper if the nonmoving party consented to trial of the issue and is not be prejudiced by the amendment. *Prieto v. Paul Revere Life Ins. Co.*, 354 F.3d 1005, 1012 (9th Cir. 2004); *Gilbane Bldg. Co. v. Fed. Reserve Bank of Richmond*, 80 F.3d 895, 901 (4th Cir. 1996). Consent may be express or implied. *Freeman v. Chi. Park Dist.*, 189 F.3d 613, 618 (7th Cir. 1999). "To establish implied consent, the [moving party] must demonstrate that [the nonmoving party] understood evidence had been introduced to prove [the new issue], and that [the new issue] had been directly addressed, not merely inferentially raised by incidental evidence." *LaLonde v. Davis*, 879 F.2d 665, 667 (9th Cir. 1989) (citations omitted); see also *Acequia, Inc. v. Clinton (In re Acequia, Inc.)*, 34 F.3d 800, 814 (9th Cir. 1994).

In the post-trial briefs and closing arguments, each side raised claims or affirmative defenses not reflected in the pleadings.<sup>3</sup>

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<sup>3</sup> Neither party has moved to amend the pleadings, but a formal motion is not required. *Torry v. Northrop Grumman Corp.*, 399 F.3d 876, 879 (7th Cir. 2005). Here, the court treats each side's arguments on the issue as a motion to amend the pleadings to conform to proof. See Fed. R. Civ. P. 15(b)(2).

1                   **1. Timothy: Excess Distributions under the Residuary**  
 2                   **Clause<sup>4</sup>**

3           Timothy seeks to include Terence's excess distributions of  
 4 \$33,157.75 to himself under the residuary clause as an additional  
 5 defalcation. Because he has not shown that Terence expressly or  
 6 impliedly consented to trial of this new issue, Timothy's motion to  
 7 amend the pleadings to conform to proof will be denied. The key is  
 8 implied consent, which turns on whether Terence understood at the time  
 9 of trial that a new, previously unpleaded issue was being introduced.  
 10 At the outset of the trial and in response to inquiries made by the  
 11 court, the parties narrowly and specifically defined the issues:

12           THE COURT: Do I understand correctly that the portion of the  
 13 trust that is in play, that has brought us here today, is  
 14 allegedly 49 guns and 200 shares of Sturm, Ruger and Company  
 15 stock?

16           MR. KRBECHER [counsel for Timothy]: It's actually 400  
 17 shares, sir, but it is 49 guns.

18           THE COURT: It is 400 shares?

19           MR. KRBECHER: Yes, sir. That's reflected in the pretrial  
 20 submissions that we had made.

21           THE COURT: Okay. That's fine. Let me get to Mr. Reich on  
 22 this in just a second. That's in essence the guts of the  
 23 problem.

24           . . . .  
 25           THE COURT: Mr. Reich?

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26           <sup>4</sup> Having pleaded a § 523(a)(4) claim that includes a request for  
 27 damages, it was unnecessary for Timothy to separately plead a claim  
 28 for prejudgment interest. See Fed. R. Civ. P. 54(c) ("Every other  
 final judgment [besides a default judgment] should grant the relief to  
 which each party is entitled, even if the party has not demanded that  
 relief in its pleadings."), incorporated by Fed. R. Bankr. P. 7054(a);  
*Fed. Sav. & Loan Ins. Corp. v. Tex. Real Estate Counselors, Inc.*, 955  
 F.2d 261, 269-70 (5th Cir. 1992) (providing that catch-all prayer for  
 "any other relief" to which the plaintiff is entitled supports award  
 of prejudgment interest).



1 MR. REICH [counsel for Terence]: Those are the two issues in  
2 front of the Court, the one regarding the guns and the other  
regarding the stock.

3 Trial Tr. 11:11-12:4, Dec. 13, 2013, ECF No. 52; *see also* Trial Tr.  
4 55:21-56:5.

5 The linchpin of Timothy's case on the question of  
6 disproportionate distributions under the residuary clause is the trust  
7 accounting. But when that document was offered, Timothy indicated  
8 that it was offered for impeachment purposes. Trial Tr. 123:15-  
9 124:26, 125:24-130:26. During trial, the stated purpose for the  
10 introduction of the accounting never changed, and the disproportionate  
11 distribution was first raised as an additional claim for relief in  
12 Timothy's post-trial brief. See Pl.'s Closing Br. 8:1-11:20,  
13 Feb. 7, 2014, ECF No. 59. The court finds that since Terence did not  
14 understand that the accounting and his testimony adduced thereunder  
15 were being offered to also establish an additional instance of  
16 defalcation until nearly two months after the evidence closed, Terence  
17 did not impliedly consent to trial of the issue.

## 18 2. Terence: Statute of Limitations

19 Similarly, Terence's motion to amend his answer to include the  
20 statute-of-limitations defenses described in California Probate Code  
21 §§ 16061.8 and 16460(a)(2) is denied. No express consent existed.  
22 Moreover, the record lacks support for implied consent. No evidence  
23 was offered on the applicability of the statute of limitations, and  
24 from that, it follows that Timothy did not understand that Terence was  
25 raising an as-of-yet unpleaded issue.

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27 ///

28 ///

1        **B. Statute of Limitations**

2        [T]here are two distinct issues to consider in the  
3        dischargeability analysis: first, the establishment of the  
4        debt itself, which is subject to the applicable state  
5        statute of limitations; and, second, a determination as to  
6        the nature of that debt, an issue within the exclusive  
7        jurisdiction of the bankruptcy court and thus governed by  
8        Bankruptcy Rule 4007.

9        *Banks v. Gill Distributions Ctrs., Inc.*, 263 F.3d 862, 868 (9th Cir.  
10       2001). A debt barred by the applicable state statute of limitations  
11       will not support a dischargeability action. *Id.*

12       Here, Terence contends that Timothy's state law claims that form  
13       the basis of the adversary proceeding were time-barred by California  
14       Probate Code §§ 16061.8 and 16460(a)(2). The problem is the  
15       affirmative defense of the statute of limitations must be pleaded in  
16       the answer. Fed. R. Civ. P. 8(c), incorporated by Fed. R. Bankr. P.  
17       7008. In most instances, an affirmative defense is waived if not  
18       pleaded in the answer. *Moore, Owen, Thomas & Co. v. Coffey*, 992 F.2d  
19       1439, 1445 (6th Cir. 1993); *Harris v. Sec'y, U.S. Dep't of Veterans*  
20       *Affairs*, 126 F.3d 339, 343 (D.C. Cir. 1997). Since Terence did not  
21       plead the affirmative defense of statute of limitations, he waived it.

22       **C. Standing and Real Party in Interest**

23       Terence argues that Timothy lacks standing to pursue an action  
24       under § 523(a)(4) and, by extension, is not the real party in interest  
25       in this action. See *Veal v. Am. Home Mortg. Servicing, Inc. (In re*  
26       *Veal)*, 450 B.R. 897, 907 (B.A.P. 9th Cir. 2011); Fed. R. Civ. P.  
27       17(a), incorporated by Fed. R. Bankr. P. 7017. Terence's argument  
28       progresses in three steps. First, Timothy triggered the in terrorem  
29       clause by seeking Terence's removal as trustee and by pursuing the  
30       § 523(a)(4) adversary proceeding. Second, having triggered the in  
31       terrorem clause, Timothy forfeited his status as a beneficiary and his

1 right to serve as trustee. Third, as a result, Timothy is not a  
2 "creditor to whom such debt is owed" within the meaning of § 523(c),  
3 the provision which describes standing to pursue a § 523(a)(4) action.

4 Terence's argument fails because Timothy has not triggered the in  
5 terrorem clause. Except as otherwise provided by law, in terrorem, or  
6 no-contest, clauses are enforceable against a beneficiary "who brings  
7 a contest within the terms of the no contest clause." Cal. Prob. Code  
8 § 21303.<sup>5</sup> Such clauses are strictly construed. Cal. Prob. Code  
9 § 21304. In this case, the in terrorem clause is only activated by  
10 the assertion of a claim (1) against the estate, will, or properties  
11 of the trust, "other than pursuant to the express terms [of the trust  
12 or will];" or (2) disputing the validity of the trust or will. Here,  
13 Timothy's actions in seeking Terence's removal and pursuing this  
14 adversary proceeding are not against the trust, will, or trust  
15 properties, nor do they seek to invalidate the trust or will. Rather,  
16 these are acts against Terence, occasioned by his failure to follow  
17 the express terms of the trust. Moreover, the no-contest clause  
18 specifically excepts from its reach claims asserted pursuant to its  
19 express terms. In this case, Timothy's adversary proceeding seeks to  
20 enforce the beneficiaries' interests as defined by the trust's express  
21 terms. As a result, Timothy has not triggered the no-contest clause,  
22 and Terence's argument fails.

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24  
25 <sup>5</sup> A no-contest clause is governed by Part 3 of Division 11 of the  
26 California Probate Code. Because the trust at issue became  
27 irrevocable before January 1, 2001, the current version of Part 3,  
28 containing California Probate Code §§ 21310-21315, does not apply.  
See Cal. Prob. Code § 21315(b). Instead, the trust is governed by the  
former, now-repealed version of Part 3, which was previously  
enumerated at California Probate Code §§ 21300-21308, 21320-21322.  
See *Fazzi v. Klein*, 190 Cal. App. 4th 1280, 1283 n.2 (2010).

## II. Nondischargeability

### A. Legal Standards

Bankruptcy Code § 523(a)(4) excepts from discharge debts for "defalcation while acting in a fiduciary capacity." To except such a debt from discharge, a creditor must prove by a preponderance of the evidence, see *Lovell v. Stanifer (In re Stanifer)*, 236 B.R. 709, 713 (B.A.P. 9th Cir. 1999), that "1) an express trust existed, 2) the debt was caused by . . . defalcation, and 3) the debtor acted as a fiduciary to the creditor at the time the debt was created," *Otto v. Niles (In re Niles)*, 106 F.3d 1456, 1459 (9th Cir. 1997) (quoting *Klingman v. Levinson*, 831 F.2d 1292, 1295 (7th Cir. 1987) (citing cases)), abrogated on other grounds, *Bullock v. BankChampaign, N.A.*, 133 S. Ct. 1754 (2013). Once the creditor has done so, the burden shifts to the debtor to render an accounting. *Id.* at 1462; see also *Pemstein v. Pemstein (In re Pemstein)*, 492 B.R. 274, 280 (B.A.P. 9th Cir. 2013). Terence conceding the first and third elements of *Klingman*, the only issue is defalcation.

Defalcation itself has two elements: The act of defalcation and the wrongful intent. The act of defalcation includes misappropriating trust assets or by failing to account for such assets. *Blyler v. Hemmeter (In re Hemmeter)*, 242 F.3d 1186, 1190 (9th Cir. 2001) (citing *Lewis v. Scott (In re Lewis)*, 97 F.3d 1182, 1186 (9th Cir. 1996)). A fiduciary also commits defalcation by using trust property in a manner inconsistent with the duties and obligations imposed by the trust. See *Lovell*, 236 B.R. at 719 (holding that a debtor's violation of the legal duties and obligations under a trust created under both statute and case law constituted a defalcation under § 523(a)(4)).

Wrongful intent requires a culpable state of mind "involving

1 knowledge of, or gross recklessness in respect to, the improper nature  
2 of the relevant fiduciary behavior." *Bullock*, 133 S. Ct. at 1757.  
3 Reckless conduct qualifies as the equivalent of "actual knowledge of  
4 wrongdoing." *Id.* at 1759. A fiduciary's conduct is reckless "if the  
5 fiduciary 'consciously disregards' (or is willfully blind to) 'a  
6 substantial and unjustifiable risk' that his conduct will turn out to  
7 violate a fiduciary duty." *Id.* (quoting Model Penal Code § 2.02(2)(c)  
8 (1985)). "That risk 'must be of such a nature and degree that,  
9 considering the nature and purpose of the actor's conduct and the  
10 circumstances known to him, its disregard involves a *gross deviation*  
11 from the standard of conduct that a law-abiding person would observe  
12 in the actor's situation.'" *Id.* at 1760 (quoting Model Penal Code  
13 § 2.02(2)(c)).

14 **B. Firearm Collection Equalizing Payment**

15 Timothy has sustained his burden of proof on the issue of  
16 defalcation with respect to the equalizing payment for the firearm  
17 collection. "If a trust has two or more beneficiaries, the trustee  
18 has a duty to deal impartially with them and shall act impartially in  
19 investing and managing the trust property, taking into account any  
20 differing interests of the beneficiaries." Cal. Prob. Code § 16003.  
21 To the same effect, "[t]he trustee shall administer the trust with  
22 reasonable care, skill, and caution under the circumstances then  
23 prevailing that a prudent person acting in a like capacity would use  
24 in the conduct of an enterprise of like character and with like aims  
25 to accomplish the purposes of the trust as determined from the trust  
26 instrument." Cal. Prob. Code § 16040.

27 Here, the trust required Terence, as the beneficiary, to make an  
28 equalizing payment of two-thirds of the value of the firearms in

1 exchange for their receipt and also required Terence, as the trustee,  
2 to collect that payment on behalf of the other beneficiaries:

3       The Trustee shall distribute Trustor Edward C. Moore's gun  
4 collection to Terrence E. Moore, Trustor Edward C. Moore's  
5 son. Terrence E. Moore shall repay one third of the fair  
6 market value of the gun collection to Deborah R. Moore and  
one third of the fair market value of the gun collection to  
Timothy E. Moore.

7 As trustee, Terence distributed the gun collection to himself, the  
8 beneficiary, without collecting the equalizing payment, which violated  
9 his duties of impartiality and prudence.

10       Terence had actual knowledge that his conduct with respect to the  
11 firearm collection was improper. *Bullock*, 133 S. Ct. at 1757 (stating  
12 that culpable state of mind includes "knowledge of . . . the improper  
13 nature of the relevant fiduciary behavior"). Most importantly,  
14 Terence knew that the terms of the trust obligated him to collect a  
15 payment of two-thirds the value of the firearms collection in exchange  
16 for the firearms collection. And Terence, as the trustee, knew that  
17 he, as the beneficiary with the payment obligation, had the ability to  
18 make this payment. He received the guns within a few days of Edward's  
19 death on September 16, 2006. By his own estimate, the high iteration  
20 of the fair market value of the collection was \$17,186, making the  
21 equalizing payment \$11,457.33. His accounting shows that on September  
22 20, 2006, he received \$75,000 from his father's estate. In the five  
23 years following his father's death, Terence received a total of  
24 \$183,157.75 in cash from his father's estate. Despite knowing that he  
25 had the means to make the equalizing payment, Terence, as the trustee,  
26 never attempted to collect the equalizing payment on behalf of the  
27 other beneficiaries. Knowledge of the obligation, the passage of  
28 time, and knowledge of his ability to perform give rise to the

1 inference that Terence made a conscious decision to violate his  
2 fiduciary duties.

3 Further facts showing actual knowledge that his actions were  
4 improper include Terence's delayed administration of the trust for  
5 more than five years coupled with refusal to provide information to  
6 Timothy when asked. During that time, his brother Timothy made  
7 informal requests for information eight times. In response, he was  
8 told "[i]t was none of [his] \*\*\*\*\* [expletive deleted] business" and  
9 "It's none of your business. I'm handling it. There's nothing you  
10 need to know. I'm the trustee. I'll get around to it. I haven't  
11 done that yet." Trial Tr. 142:5-13. Until forced to do so by his  
12 brother, Terence failed to file an accounting for the estate, from  
13 which third parties could have detected the failure to collect the  
14 equalizing payment. The refusal to provide information suggests that  
15 Terence was attempting hide his refusal to perform.

16 The court finds that Terence knew of his obligations under the  
17 trust and knew that his failure to collect the equalizing payment from  
18 himself was improper but made a conscious decision not to do so. As a  
19 result, Terence committed a defalcation with respect to the equalizing  
20 payment for the firearm collection.

21 **C. 400 Shares of Sturm Ruger Stock**

22 Timothy has sustained his burden of proof on the issue of  
23 defalcation with respect to the 400 shares of Sturm Ruger stock.  
24 Terence breached his fiduciary duty by moving the Sturm Ruger stock  
25 from his father's account to his own, selling it, and retaining the  
26 proceeds. See Cal. Prob. Code § 16003 (duty of impartiality).  
27 Unlike the firearm collection, the stock was governed by the residuary  
28 clause. The conversion of trust assets, which should have been

1 divided between all three sibling beneficiaries, to Terence's own  
2 personal use is a breach of his fiduciary duties.

3 Terence's actions show that at the very least he consciously  
4 disregarded a substantial and unjustifiable risk that retention of the  
5 stock proceeds violated his fiduciary duty--and probably had actual  
6 knowledge that retention of the proceeds was improper. This is well  
7 demonstrated by these facts. At the outset, the residuary clause of  
8 the trust specifically and unequivocally provides that the stock, not  
9 otherwise provided for in the trust, should have passed to each of the  
10 residuary beneficiaries. Terence admits reading each document dozens  
11 of times, from which he is charged with knowledge of their terms.  
12 Further, the appropriation of trust assets for personal use, without  
13 sufficient explanation, is a gross deviation from the conduct a law-  
14 abiding person would observe. That Timothy was unaware of the  
15 existence of the stock suggests a greater than ordinary chance that  
16 the appropriation would not be detected. As with the equalizing  
17 payment for the firearm collection, Terence refused to provide  
18 information for five years and when the accounting was filed it  
19 omitted the Sturm Ruger stock. These facts suggest an intention to  
20 hide the transaction and, from that, a knowledge of its impropriety.  
21 For each of these reasons, the court finds that Terence knew of his  
22 obligations under the trust and knew that his appropriation of the  
23 stock was improper. As a result the burden of proof shifts to Terence  
24 to render an accounting. *Otto*, 106 F.3d at 1462; see also *Pemstein*,  
25 492 B.R. at 280.

26 But Terence has not sustained his burden. He suggests the stock  
27 was sold to reimburse himself for expenses. Yet, the only accounting  
28 he has provided is, by his own words, incomplete and inaccurate.



1 Moreover, the court finds this explanation not credible in light of  
2 the trust's other cash assets.

3 As a result, Timothy has carried his burden of proof establishing  
4 Terence's defalcation in failing to collect the equalizing payment for  
5 the firearm collection and misappropriating the 400 shares of Sturm  
6 Ruger stock.

### 7 **III. Damages**

#### 8 **A. Legal Standards**

9 In a § 523(a)(4) action, the amount of the nondischargeable debt  
10 (i.e., the damages) is determined by state law. See *Roussos v.*  
11 *Michaelides* (*In re Roussos*), 251 B.R. 86, 93 (B.A.P. 9th Cir. 2000),  
12 *aff'd*, 33 F. App'x 365 (9th Cir. 2002). Under California law, a  
13 trustee who commits a breach of trust is typically liable for the  
14 "loss or depreciation in value of the trust estate resulting from the  
15 breach of trust." Cal. Prob. Code § 16440(a)(1).

16 Prejudgment interest may also be awarded. See *Cobe v. Smith* (*In*  
17 *re Cobe*), 229 B.R. 15, 18 (B.A.P. 9th Cir. 1998) (citing *Cohen v. de*  
18 *la Cruz*, 523 U.S. 213, 218-23 (1998)). "In the context of a  
19 § 523(a)(4) proceeding, it has been held [by the Ninth Circuit] that  
20 it is proper for the bankruptcy court to apply state law to calculate  
21 prejudgment interest into the amount of the nondischargeable debt."  
22 *Roussos*, 251 B.R. at 94 (emphasis added) (citing *Otto*, 106 F.3d at  
23 1463); accord *Otto*, 106 F.3d at 1463 ("Because the debt the court  
24 found to be nondischargeable arose under state law, the award of  
25 prejudgment interest on that debt is also governed by state law."  
26 (citation omitted)). California law provides for interest at 10% per  
27 annum. See Cal. Prob. Code §§ 16440(a)(1), 16441(a)(1); Cal. Civ.  
28 Proc. Code § 685.010(a); *Uzyel v. Kadisha*, 188 Cal. App. 4th 866, 921

(2010). Interest "begins to accrue on the date of the loss or depreciation in value," *Uzyel*, 188 Cal. App. 4th at 923 n.42, and continues to accrue even after the petition is filed, see *Foster v. Bradbury* (*In re Foster*), 319 F.3d 495, 497 (9th Cir. 2003) (per curiam) (nondischargeable child support debt); *Ward v. Bd. of Equalization* (*In re Artisan Woodworkers*), 204 F.3d 888, 891-92 (9th Cir. 2000) (nondischargeable tax debt); *Great Lakes Higher Educ. Corp. v. Pardee* (*In re Pardee*), 218 B.R. 916, 921 (B.A.P. 9th Cir. 1998) (nondischargeable student loan debt), *aff'd*, 193 F.3d 1083 (9th Cir. 1999). Thus, prejudgment interest in a nondischargeability proceeding is calculated through the date of judgment. See *DeVries v. Clark* (*In re Clark*), Bankr. No. 12-00649-TLM, Adv. No. 13-06034-TLM, 2014 WL 174935, at \*5 (Bankr. D. Idaho Jan. 10, 2014).

#### **B. Firearm Collection Equalizing Payment**

As to the equalizing payment for the firearm collection, the trust provides for two-thirds of the fair market value of the collection. The court believes that term is defined by the fair market retail value, after discounting the firearms for condition but without costs of sale, and determines that amount to be \$17,186. As a result, the two-thirds payment due to Timothy, as trustee, is \$11,457.33. Interest on this amount is \$8,989.82.<sup>6</sup> As a result, the aggregate due for the defalcation with respect to the firearm collection equalizing payment is \$20,447.15.

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<sup>6</sup> On the debt owed with respect to the equalizing payment, interest accrues at a rate of \$3.14 a day (\$11,457.33 principal x 10% annual interest rate ÷ 365 days). Interest accrues from September 16, 2006, through July 18, 2014, or 2,863 days. As of July 18, 2014, the total amount of prejudgment interest is \$8,989.82 (\$3.14 daily interest x 2,863 days).

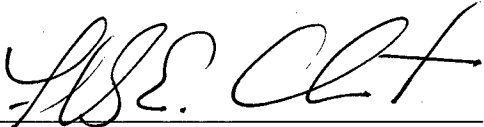
C. 400 Shares of Sturm Ruger Stock

As to the 400 shares of Sturm Ruger stock, the net amount Terence realized was \$4,815.31, which is the proper measure of damages. Interest on this amount is \$2,377.32.<sup>7</sup> As a result, the aggregate due for the defalcation with respect to the Sturm Ruger stock is \$7,192.63.

CONCLUSION

For each of these reasons, judgment shall be entered for Timothy E. Moore in his capacity as trustee and beneficiary of the Edward C. Moore and Marie Moore Family Trust dated November 12, 1992, and against Terence Edward Moore in the amount of \$27,639.78.<sup>8</sup> Counsel for Timothy E. Moore shall prepare and lodge a judgment consistent with the findings herein.

Dated: July 18, 2014

  
 Fredrick E. Clement  
 United States Bankruptcy Judge

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<sup>7</sup> On the debt owed with respect to the Sturm Ruger stock, interest accrues at a rate of \$1.32 a day (\$4,815.31 principal x 10% annual interest rate ÷ 365 days). Interest accrues from August 13, 2009, through July 18, 2014, or 1,801 days. As of July 18, 2014, the total amount of prejudgment interest is \$2,377.32 (\$1.32 daily interest x 1,801 days).

<sup>8</sup> This is comprised of \$20,447.15 and \$7,192.63. Prejudgment interest has been computed only until July 18, 2014. As a result, the judgment may include interest from July 19, 2014, through the date of entry of judgment, at the rate of \$4.46/day (\$3.14/day for firearm equalizing payment + \$1.32/day for Sturm Ruger stock).

**Instructions to Clerk of Court  
Service List**

The Clerk of Court is instructed to send the Order/Judgment or other court generated document transmitted herewith to the parties below. The Clerk of Court will send the Order via the BNC or, if checked   X  , via the U.S. mail.

Debtor(s), Attorney for the Debtor(s), Bankruptcy Trustee (if appointed in the case), and   X   Other Persons Specified Below:

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